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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CESAR CABRERA, Defendant and Appellant.	B208011 (Los Angeles County Super. Ct. No. LA053140)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Modified and, as modified, affirmed with directions.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Cesar Cabrera appeals from the judgment entered following his convictions by jury on three counts of attempted voluntary manslaughter (Pen. Code, §§ 664, 192, subd. (a)), each a lesser included offense of attempted murder (Pen. Code, §§ 664, 187; counts 1 through 3)) with personal use of a firearm (Pen. Code, § 12022.5, subd. (a)), personal and intentional use of a firearm (Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)), and with, as to the attempted voluntary manslaughter which is a lesser offense of count 1, personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)), and following his convictions by jury on count 4 – shooting at an occupied motor vehicle (Pen. Code, § 246) with personal use of a firearm (Pen. Code, § 12022.5, subd. (a)), personal and intentional discharge of a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)), and personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)) and on count 5 – assault with a firearm (Pen. Code, § 245, subd. (a)(2)) with personal use of a firearm (Pen. Code, § 12022.5, subd. (a)) and personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)). The court sentenced appellant to prison for 5 years plus 25 years to life. We modify the judgment and, as so modified, affirm it with directions.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on July 10, 2006, Tiffany Hardy, Robair Kasbarian, and Charlie Ayala were at a Los Angeles County park. Appellant was with three other persons. Appellant's group was laughing and saying things to Hardy, Kasbarian, and Ayala, causing the latter three to leave. As Hardy, Kasbarian, and Ayala walked to Kasbarian's car, appellant called Kasbarian a bitch and a faggot. Ayala and Kasbarian sat in the front driver's seat and front passenger's seat, respectively, of Kasbarian's car, and Hardy sat in the back seat behind Kasbarian.

Ayala, with Kasbarian and Hardy in the car, began driving to leave. At one point, appellant, probably about 15 feet from the rear passenger side of the car, said something to the car's occupants. Appellant backed up a few steps and fired four shots into the car. The third or fourth bullet struck Hardy.

2. *Defense Evidence.*

In defense, appellant testified he had the gun because of a previous incident during which a friend had been killed. Appellant had been shot during that incident and had lost a leg as a result. Appellant testified to the effect that, during the present incident, he fired shots towards the car to defend himself because he believed Kasbarian, who was in the car, was pointing a gun at appellant. Appellant did not intend to hurt anyone when appellant fired the gun. Appellant later threw the gun in a trash can.

CONTENTIONS

Appellant claims (1) imposition of the Penal Code section 12022.53, subdivision (d) enhancement on count 4 was cruel and unusual punishment, (2) the trial court violated Penal Code section 654 by imposing punishment on his three convictions for attempted voluntary manslaughter and his conviction for shooting at a motor vehicle, and (3) the Penal Code section 12022.53, subdivision (d) enhancements to the three attempted voluntary manslaughter convictions must be stricken.

DISCUSSION

1. *Imposition of The Penal Code Section 12022.53, Subdivision (d) Enhancement as to Count 4 Was Neither Cruel Nor Unusual Punishment*.

a. *Pertinent Facts*.

The second amended information alleged as to counts 1 through 3 that appellant committed attempted murder upon Hardy, Kasbarian, and Ayala, respectively, shooting at an occupied motor vehicle (count 4), and assault with a firearm (count 5) upon Hardy, with various enhancements as to each count.

The preconviction probation report prepared for a January 2007 hearing reflects appellant was born in 1985 and has four aliases. The report reflects concerning the present offense that appellant and a male confederate were involved in a verbal

altercation with Hardy and her friends during a softball game at a park. Appellant and his confederate gave a " 'mad dog' " stare at Hardy and her friends. Hardy and her friends later attempted to leave in a car when appellant approached and began arguing with them. The above mentioned shooting later occurred, and appellant fled.

The report also reflects as follows. As a juvenile, in 2000, and 2002, appellant suffered a sustained petition for vandalism and, each time, he was placed in camp. In October 2003, appellant was convicted of carrying a concealed weapon and placed on probation for three years. In 2005, appellant was convicted of possessing not more than an ounce of marijuana. According to a previous probation report, appellant had used marijuana about twice a week since he was 16 years old and he suffered from epilepsy. The current preconviction probation report states, "Defendant has been identified as being a member [of the] Haskell Locos gang graffiti member." (*Sic*.) (Some capitalization omitted.)

The current report also states, "[a]t the time of the defendant's arrest in the instant matter, he was on probation for being in possession of a concealed weapon. His criminal activity in the community has progressed to a point where the defendant has discharged his weapon in an unsafe manner after being involved in a verbal altercation with the victim [Hardy]. The instant matter resulted in the victim sustaining a gunshot wound to her shoulder. The defendant has displayed that he is a danger to the well being of the community and if convicted in the instant matter it is believed that the defendant should be removed from the community for as long as allowed by law." (Some capitalization omitted.)

The report listed as aggravating factors that appellant's prior convictions as an adult or adjudications of commissions of crimes as a juvenile were numerous or of increasing seriousness, he was on probation when he committed a crime, he had engaged in violent conduct which indicated a serious danger to society, and the crime involved a threat of great bodily harm or other acts disclosing a high degree of callousness. The report indicated there were no mitigating factors, and recommended imprisonment for the "high base term." (Capitalization omitted.)

In the present case, the court instructed the jury on attempted voluntary manslaughter based upon imperfect self-defense (not sudden quarrel or heat of passion) as a lesser included offense of each of counts 1 through 3. The jury convicted appellant as previously indicated. Appellant filed a sentencing memorandum in which he argued that imposition of a 25-years-to-life enhancement was cruel and unusual punishment.

At the May 13, 2008 sentencing hearing, the court indicated it had read the probation report and the parties' sentencing memoranda. The court sentenced appellant on count 4 to five years in prison for the violation of Penal Code section 246, plus 25 years to life pursuant to Penal Code section 12022.53, subdivision (d), with a concurrent three-year term for each of the three attempted voluntary manslaughter convictions. The court stayed sentencing on count 5 pursuant to Penal Code section 654.

b. *Analysis*.

We have set forth the facts pertinent to appellant's cruel and unusual punishment claim. We conclude that imposition of the Penal Code section 12022.53, subdivision (d) enhancement as to count 4 did not violate constitutional proscriptions against cruel or unusual punishment. (Cf. *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212-1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-18; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493-497, fn. 6; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 177; see *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116-1118.) None of the cases cited by appellant compels a contrary conclusion.

2. *Multiple Punishment on the Three Attempted Voluntary Manslaughter Convictions and on Count 4 Violated Penal Code Section 654.*

Appellant claims the trial court violated Penal Code section 654, by imposing punishment on the three attempted voluntary manslaughter convictions and on count 4.[1] We agree.

Penal Code section 654 states, in relevant part, "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

In *People v. Kwok* (1998) 63 Cal.App.4th 1236 (*Kwok*), the court stated, "[a]lthough section 654 literally applies only where multiple statutory violations arise out of a single 'act or omission,' it has also long been applied to cases where a 'course of conduct' violates several statutes. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 . . . ; [citation].) A 'course of conduct' may be considered a single act within the meaning of section 654 and therefore be punishable only once, or it may constitute a 'divisible transaction' which may be punished under more than one statute. (*Neal v. State of California, supra,* at p. 19; [citation].) Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence. [Citations.]

"In what has been characterized as a 'judicial gloss' on the language of section 654 [citations], the basic test used for determining whether a 'course of conduct' is divisible was stated in *Neal* as follows: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to

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[1] Although the heading in appellant's opening brief on this issue indicates that Penal Code section 654 barred sentencing on any count other than count 4, we note the trial court stayed sentencing on count 5 pursuant to Penal Code section 654; therefore, count 5 is not at issue.

one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*Kwok, supra,* 63 Cal.App.4th at pp. 1252-1253.)

Notwithstanding a determination that a defendant entertained but a single principal objective during an indivisible course of conduct, the defendant may nevertheless be punished for multiple convictions if during the course of that conduct the defendant committed crimes of violence against different victims. (*People v. Miller* (1977) 18 Cal.3d 873, 885.)

In the present case, there was substantial evidence that, as a result of a previous verbal altercation, appellant shot at Kasbarian's occupied motor vehicle (count 4) to commit attempted voluntary manslaughter (in imperfect self-defense) upon each of its occupants, i.e., Hardy, Kasbarian, and Ayala. There is no substantial evidence that appellant shot at the occupied motor vehicle with any other intent or objective, and respondent suggests none.

People v. Kane (1985) 165 Cal.App.3d 480 (*Kane*), cited by appellant, is analogous. In *Kane*, a defendant fired at a car containing only its driver. The defendant was convicted of shooting at an occupied motor vehicle (Pen. Code, § 246), assault with a deadly weapon, and possession of a firearm by a felon. In *Kane*, the Attorney General conceded, and the appellate court held, that multiple punishment for the three offenses violated Penal Code section 654. (*Kane, supra,* at pp. 483-484, 488.)

Unlike *Kane*, in the present case Kasbarian's car contained multiple occupants. However, similar to *Kane*, in the present case there was substantial evidence that appellant committed the offense of shooting at an occupied motor vehicle to commit attempted voluntary manslaughter upon all of its occupants. Imposition of punishment on count 4 with concurrent sentencing on the three attempted voluntary manslaughter convictions violated Penal Code section 654. (Cf. *Kane, supra,* 165 Cal.App.3d at p. 488.) We will modify the judgment to stay execution of sentence on each of appellant's convictions for attempted voluntary manslaughter (for which the trial court imposed concurrent sentences).

Respondent does not expressly dispute that count 4, and the three attempted voluntary manslaughter offenses, are part of an indivisible course of conduct, but argues the multiple victim exception to Penal Code section 654 applies to justify multiple punishment. We disagree.

Respondent's reliance on *People v. Felix* (2009) 172 Cal.App.4th 1618 (*Felix*), is misplaced.[2] In *Felix*, a defendant fired at a house containing occupants, including Martin Gomez, in an effort to murder Gomez. The defendant was convicted of, inter alia, shooting at an inhabited dwelling (count 2; Pen. Code, § 246) and attempting to murder Gomez (count 1). *Felix* held multiple punishment on both counts did not violate Penal Code section 654. *Felix* reasoned that count 2 was a crime of violence against multiple victims (i.e., all of the occupants, including Gomez) whereas count 1 was a crime of violence against Gomez only. *Felix* concluded that since Gomez was not the sole victim of each crime of violence at issue in counts 1 and 2, the multiple victim exception to Penal Code section 654 applied. (*Felix*, *supra*, 172 Cal.App.4th at pp. 1630-1631.)

The result in *People v. Masters* (1987) 195 Cal.App.3d 1124 (*Masters*), cited by appellant and involving, like the present case, the offense of shooting at an occupied motor vehicle, was the same. In *Masters*, the defendant fired at an occupied motor vehicle containing a driver and two other occupants. The defendant was convicted of shooting at an occupied motor vehicle (count 2; Pen. Code, § 246) and assault with a deadly weapon (count 1) upon Derrick Ross, one of the occupants. (*Masters*, at pp. 1126-1127.)

Like *Felix*, *Masters* held multiple punishment on both counts did not violate Penal Code section 654. *Masters* stated, "[t]he preclusion of section 654's application does not depend upon a determination that the victims of one violent crime are entirely different from the victims of a second violent crime committed in the same course of conduct. As

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[2] Respondent also relies on *People v. Lawrence* (2000) 24 Cal.4th 219, 229, but nothing held in that decision, which involved statutory interpretation of the "Three Strikes" law, supports respondent, and the cited point page merely recites the multiple victim exception to Penal Code section 654.

long as each violent crime involves at least one different victim, section 654's prohibition against multiple punishment is not applicable. [Citations.]." (*Masters, supra,* 195 Cal.App.3d at p. 1128.)

Masters continued, "[i]n our view, Masters's violation of section 245, subdivision (a)(2), and section 246, while in the same course of conduct, resulted in the commission of violent crimes against different victims. Manifestly, Derrick Ross was the unfortunate victim of Masters's assault with a deadly weapon and all three occupants of the Mustang were victims of his discharge of the firearm at the vehicle. As Masters's violent actions were performed in a manner likely to cause harm to all three individuals in the vehicle, and in fact did seriously injure one person, the section 654 proscription against multiple punishment for violations arising from an indivisible course of conduct is inapplicable." (*Masters, supra,* 195 Cal.App.3d at p. 1128.)

Masters distinguished *Kane*. *Masters* stated, "[n]either does the opinion in [*Kane*] provide support for Masters's position. In *Kane,* the Court of Appeal held that the section 654 prohibition against multiple punishment applied to a defendant's convictions for assault with a deadly weapon (§ 245, subd. (a)), discharge of a firearm into an occupied motor vehicle (§ 246), and possession of a firearm by a convicted felon (§ 12021), where the convictions arose out of the same shooting incident. *However, this ruling is inapplicable to the instant case for the reason that there was only one victim in Kane. The same individual was the victim of both the assault with the deadly weapon and the discharge of the firearm into the occupied motor vehicle.* (*Id*., at p. 488.) Unlike *Kane*, multiple victims of violent crimes are involved herein, and application of section 654's prohibition against multiple punishment is precluded. Thus, while the question of different violent crime victims was not at issue in *Kane,* it is determinative of this issue in Masters's appeal." (*Masters, supra,* 195 Cal.App.4th at p. 1130, italics added.) Unlike the case in *Masters*, the reasoning of *Kane* controls the present case. We will modify the judgment accordingly.

3. *The Penal Code Section 12022.53, Subdivision (d) Enhancements as to the Three Attempted Voluntary Manslaughter Convictions Must Be Stricken.*

Appellant claims the Penal Code section 12022.53, subdivision (d) enhancements as to his three attempted voluntary manslaughter convictions must be stricken. We agree.

Penal Code section 12022.53, subdivision (d) applies only if the underlying felony to which the subdivision (d) enhancement pertains is listed in subdivision (a). Attempted voluntary manslaughter is not a felony listed in Penal Code section 12022.53, subdivision (a). The prosecutor acknowledged this during discussions concerning proposed jury instructions and, accordingly, the trial court revised the proposed instructions by striking the reference to attempted voluntary manslaughter as an underlying felony for purposes of the Penal Code section 12022.53, subdivision (d) enhancement instructions, but the verdict forms as to the attempted voluntary manslaughter charges were not so revised. Respondent concedes the above and that said enhancements must be stricken and the abstract of judgment modified accordingly. (See *People v. Riva* (2003) 112 Cal.App.4th 981, 1000; *People v. Watie* (2002) 100 Cal.App.4th 866, 884-885.)

DISPOSITION

The judgment is modified by (1) striking the Penal Code section 12022.53, subdivision (d) enhancement as to each of appellant's three convictions for attempted voluntary manslaughter, and (2) staying execution of sentence on each of said three convictions, such stay then to become permanent, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.